



# THE COMMITTEE ON ENERGY AND COMMERCE

## INTERNAL MEMORANDUM

February 7, 2011

To: Health Subcommittee Members

From: Majority Staff

Re: H.R. \_\_\_, to prevent federal funding of abortion or abortion coverage under PPACA

The Subcommittee on Health will hold a legislative hearing on a draft bill (the “Discussion Draft”) to prevent federal funding of abortion or abortion coverage under the Patient Protection and Affordable Care Act (“PPACA”) on Wednesday February 9, 2011 at 1:00 p.m. in room 2123 Rayburn House Office Building.

### **Witnesses for the Hearing:**

The following witnesses will testify before the Subcommittee:

- Helen Alvare, Associate Professor of Law, George Mason University School of Law
- Sara Rosenbaum, Chair, Department of Health Policy, George Washington University
- Douglas Johnson, Federal Legislative Director, National Right to Life Committee

### **Background:**

The Discussion Draft amends PPACA to prevent federal funding of abortion or abortion coverage. It also ensures that nothing in PPACA can be construed to require coverage of, or access to, abortion and to ensure that nothing in PPACA allows anyone implementing PPACA to require “coverage of, access to, or training in abortion services.”

During the 111<sup>th</sup> Congress debate on H.R. 3962, the Affordable Health Care for America Act, the House adopted the Stupak/Pitts amendment. This provision contained many of the elements that are now included in the Discussion Draft. However, when the House ultimately adopted PPACA, the legislation contained significantly different provisions than the Stupak/Pitts amendment. PPACA does not contain comprehensive anti-mandate provisions with respect to abortion for qualified health benefits plans, nor does it clearly prohibit other methods of mandating abortion coverage – such as through preventive care requirements.

PPACA establishes “allocation accounts” to segregate federal funds from premium funds that can be used for abortion coverage. Under this system, the plan issuer is required to collect the enrollee’s portion of the premium in two payments. One payment goes into an account for abortion coverage and the other payment goes into an account for all other coverage. This has sometimes been referred to as an “abortion surcharge.”

PPACA contains a definition of services that hinges on the Hyde amendment restriction on abortion funding or future derivations of the Hyde amendment. This approach allows the accounting system to disappear altogether if the Hyde amendment is not included in future Appropriations bills.

Currently, PPACA includes a provision requiring the Director of the Office of Personnel Management (“OPM”) to ensure that one multi-State plan does not cover elective abortion. This permits the Director to offer additional multi-State plans that do cover abortion. Individuals who prefer the overall coverage in a plan that covers elective abortion must pay the abortion surcharge in order to choose that plan.

### **Details of the Discussion Draft:**

The Discussion Draft legislation, like the Stupak-Pitts amendment, contains the Hyde limitation on funding for abortion and abortion coverage consistent with the policies applied to Medicaid, the Federal Employee Health Benefits Program, and other federal programs. Specifically, the Discussion Draft:

- States that no funds authorized or appropriated by PPACA, including tax credits and cost-sharing reductions, may be used to pay for abortion or abortion coverage except in cases of rape, incest, or to save the life of the mother.
- Specifies that any non-Federal entity (including individuals and State or local government) may purchase a separate elective abortion rider, or may purchase insurance coverage that includes elective abortion, so long as the coverage is not paid for with PPACA funds, and is not paid for using individual, State or local funds *required* to receive federal financial assistance.
- Specifies that insurance issuers may offer health plans that include elective abortion and may offer separate elective abortion riders, so long as they ensure PPACA funds are not used for premiums or administrative costs. Further clarifies that issuers who offer elective abortion coverage must also offer a qualified health benefits plan that is identical except that it does not cover elective abortion.
- Ensures nonpreemption of State laws “protecting conscience rights, restricting or prohibiting abortion or coverage or funding of abortion, or establishing procedural requirements on abortion.” For the provision regarding Federal laws, a technical reference is included to ensure there is no conflict between this provision and the “Hyde-Weldon” conscience provision that was added to the Hyde amendment in FY2005.
- States that Federal programs and state or local governments that receive Federal financial assistance under PPACA may not subject any health care entity to discrimination or require any health plan to subject any entity to discrimination on the

basis that the entity refuses to (A) undergo training in abortion, (B) require or provide such training, (C) perform, participate in, provide coverage of, or pay for abortions, or (D) provide referrals for training or abortion.

- Defines “health care entity” to include individual health care professionals, hospitals, insurance plans, or “any other kind of health care facility, organization or plan.”
- Includes a remedies section so that individuals who have been discriminated against or are under threat of discrimination may seek redress in court.
- Designates the Office for Civil Rights (“OCR”) at the Department of Health and Human Services (“HHS”) to receive complaints and pursue investigations in coordination with the Attorney General. Under conscience regulations issued in January 2009, OCR is designated to receive complaints. However, this designation could be rescinded in the future.
- Requires the OPM Director to ensure that no multi-State plan covers elective abortion.

Please do not hesitate to contact Ryan Long, Chief Counsel for the Health Subcommittee, at x5-2927 with any questions or if we can otherwise be of assistance.